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No. 84-884

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

COAL EXPORTERS ASS'N OF THE UNITED STATES, NATIONAL COAL ASS'N AND EASTERN COAL TRANSPORTATION CONFERENCE, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT S. BURK
Acting General Counsel

LAWRENCE H. RICHMOND
Deputy Associate General Counsel

H. GLENN SCAMMEL
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1846

30 pp

QUESTIONS PRESENTED

Section 10505 of the Interstate Commerce Act requires the ICC to exempt classes of railroad transportation from regulation when the ICC finds that: (1) regulation is unnecessary to carry out the national transportation policy; and (2) regulation is not needed to protect shippers from the abuse of market power. This case concerns the ICC's decision to exempt export coal rail transportation.* The Commission, relying on a history of rail rates below ICC-authorized levels, its judgment on the relevant market forces, and its own power to revoke the exemption if its predictions prove wrong, concluded that continued regulation was not needed to protect shippers from unreasonable and abusive rates. The questions presented are:

1. Whether the court of appeals impermissibly substituted its judgment for the Commission's by: (1) dismissing as irrelevant the Commission's factually based predictions about future rate reasonableness; and (2) holding the exemption invalid as a matter of law because the court believed the Commission's standard for determining rate reasonableness improperly balanced the interests of shippers and railroads.

2. Whether the court of appeals erred by ignoring the Commission's revocation power and by imposing on the Commission requirements, not found in the

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* The petition for writ of certiorari in a companion case, docketed as No. 84-550, *Interstate Commerce Commission* v. *Brae Corp. et al.*, seeks review of a decision of the same United States Court of Appeals overturning a Commission decision exempting traffic moving in boxcars from rate and car service regulation.

exemption provision, for impossibly detailed advance determinations of rate reasonableness, which errors if not corrected by this Court will effectively preclude the Commission from carrying out its Congressionally mandated duty to use the exemption provision.

PARTIES TO THE PROCEEDING

The following parties appeared in the proceedings before the Court of Appeals below:

Norfolk and Western Railway Company
Chessie System Railroads
Seaboard System Railroad, Inc.
The Atchison, Topeka & Santa Fe Railway Company
Burlington Northern Railroad Company
Denver & Rio Grande Western Railway Company
Union Pacific Railroad Company
Utah Railway Company
Coal Exporters Association of the United States, Inc.
National Coal Association
Eastern Coal Transportation Conference
Coastal States Energy Company
Patrick W. Simmons (Illinois Legislative Director of the United Transportation Union)
Nippon Steel Corporation
Kawasaki Steel Corporation
Kobe Steel, Ltd.
Nippon Kohan K. K.
Nisshin Steel Company, Ltd.
Sumitomo Metal Industries, Ltd.
Interstate Commerce Commission
United States of America

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COAL EXPORTERS ASS'N OF THE UNITED STATES, NATIONAL COAL ASS'N AND EASTERN COAL TRANSPORTATION CONFERENCE, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Interstate Commerce Commission petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a, *infra*) is reported at 745 F.2d 76 (1984). The principal decision of the Interstate Commerce Commission (App. 50a, *infra*) is reported at 367 I.C.C. 570 (1983). The Commission's later order denying an administrative stay (App. 126a, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 48a, *infra*) was entered on September 18, 1984. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10101a and 10505, are set forth at App. 150a, *infra*.

STATEMENT

1. This case concerns the Interstate Commerce Commission's application of the power, delegated by 49 U.S.C. (Supp. V) 10505, to exempt rail transportation from the requirements of the Interstate Commerce Act. Under Section 10505, the Commission "shall exempt" rail transportation "when the Commission finds that the application of a provision of this subtitle . . . is not necessary to carry out the transportation policy of section 10101a" and either the rail transaction or service "is of limited scope" or the application of the statute "is not needed to protect shippers from the abuse of market power." 49 U.S.C. (Supp. V) 10505(a).[1] The Commission "may revoke an exemption, to the extent it specifies," when it finds that application of the statute "is necessary to carry out the transportation policy of section 10101a." 49 U.S.C. (Supp. V) 10505(d). No administrative hearing is required prior to granting or revoking an exemption. 49 U.S.C. (Supp. V) 10505(b), (d); H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 104-05 (1980).

The duty to carry deregulation of rail transportation beyond the areas expressly removed from the

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[1] In the present case, the Commission relied upon the lack of any need for continued regulation to prevent harm to shippers from abuse of market power.

ICC's jurisdiction by statute was first imposed on the Commission in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, § 207, 90 Stat. 21 (1976), which was enacted in an attempt to remedy the rail industry's precarious financial condition.[2] Originally, the statute allowed only exemptions of "services or transactions by reason of the[ir] limited scope." *Ibid.* The clear legislative intent was to "give the Commission considerable flexibility to try innovative, *experimental* programs to determine exactly what kind of less stringent regulation may work." H.R. Rep. 94-725, 94th Cong., 1st Sess. 243 (1975) (emphasis added). The 4R Act's reforms were inadequate to remedy the rail industry's financial problems, however. Congress therefore enacted more sweeping reforms in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.* (1980).

Those reforms included eliminating by statute the Commission's jurisdiction over specified aspects of rail transportation,[3] and as relevant here, expanding the exemption power beyond rail matters of "limited scope" and specifically directing the Commission to use that power to deregulate in areas beyond those

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[2] The Commission exercised the power by exempting rail movements of fresh fruit and vegetables, which were subject to intense motor carrier competition. *Rail General Exemption Authority—Fresh Fruit and Vegetables,* 361 I.C.C. 374 (1979).

[3] For example, Congress further confined the Commission's jurisdiction to non-competitive ("market dominant") rates (49 U.S.C. (Supp. V) 10701a and 10709). It also created a zone within which rates are insulated from regulation, and a fast mechanism for railroads to recover cost increases without regulatory interference (Section 10707a).

explicitly deregulated by the statute. The legislative history of the exemption provision confirms that the Commission was to remove "as many as possible of the Commission's restrictions on changes in prices and services" and to "adopt a policy of reviewing [rail] carrier actions after the fact to correct abuses of market power." H.R. Conf. Rep. 96-1430, *supra*, at 105. Regulation was to be reduced to the levels necessary "to protect against abuses of market power where other federal remedies are inadequate for this purpose." *Id.* Congress viewed the mandate to exempt additional aspects of rail transportation as an "important cornerstone" of the Staggers Act and a key element in the effort to obtain greater reliance on the marketplace. H.R. Rep. 96-1035, 96th Cong., 2d Sess. 60 (1980). As the Act's sponsor and namesake confirmed on the floor of the House (126 Cong. Rec. H10085 (daily ed. Sept. 30, 1980) (emphasis added)):

> This legislation . . . is to be a *first step* toward treating the American railroad industry as any other business which is best "regulated" by the marketplace. The exemption authority has been carefully drafted to limit regulation to the bare essentials necessary to protect against abuse of market power. *It is the intent of the conference committee that this standard would permit the exemption of any provision in the act, except as specified in the exemption section.*

The Commission's first post-Staggers Act exercise of the expanded exemption power was in an area to which Congress had specifically adverted (in 49 U.S.C. (Supp. V) 10505(f)) as appropriate for exemption—intermodal transportation. *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 73 (1981). That

first step was substantially affirmed in *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981). Subsequently, the Commission examined other areas for possible exemption, ultimately granting two major exemptions. One of these involved boxcar traffic, which the Commission exempted in a series of decisions in Ex Parte No. 346 (Sub-No. 8), *Exemptions From Regulation—Boxcar Traffic*.[4] The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's finding that regulation of boxcar rates is unnecessary to protect shippers from market power abuse, but reversed the exemption as to the Act's joint rate and car service provisions. *Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984).[5]

2. The second major exemption was of export coal, which is the subject of this petition. Acting on a petition filed by eastern rail carriers, and after public comment and oral argument, the Commission decided to exempt rail transportation of export coal from all provisions of the Interstate Commerce Act. Ex Parte No. 346 (Sub-No. 7), *Railroad Exemption—Export Coal*, 367 I.C.C. 570 (1983) (App. 50a, *infra*).

The Commission began its decision with an exhaustive analysis of the market environment in which export coal transactions are conducted. First, the Commission looked at the size and number of firms

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[4] The Commission's initial decision appears at 367 I.C.C. 424 (1983). At 367 I.C.C. 747 (1983) the agency denied petition for reconsideration. In an unprinted decision served November 30, 1983, the agency denied motions for administrative stay. Finally, the Commission considered further issues in an unprinted order served December 19, 1983.

[5] In No. 84-550, the Commission has petitioned this Court for a writ of certiorari in the *Brae* case.

selling and buying coal for export (App. 52a-56a, *infra*). The agency noted that a handful of large shippers accounted for the overwhelming majority of export coal traffic on the major export rail carriers (*ibid.*). The Commission considered the pricing practices prevalent in the export market and found a general consensus (App. 56a, *infra*) that net delivered price (minehead price plus transportation) was the key competitive factor in export coal sales. Given that fact, any over-pricing of American coal would produce a rapid decline in American export sales (App. 57a-59a, *infra*).

The agency then turned to the historical record of export coal pricing in recent years (App. 64a-65a, *infra*). The Commission found the division of economic "rents" (profits in excess of the price level required to continue to attract capital) allowed by the net-delivered-price world market to be "the heart of this case" (App. 65a, *infra*). The historical record of recent years showed that the coal mines had been able to gain a substantial proportion of the economic rent increases on export coal, while the rail carriers had not even been able to take rate increases (reflecting increased costs) that were officially authorized by the Commission (*ibid.*). The Commission noted (App. 65a n.29, 85a n.63, *infra*) that in some instances, carriers had actually reduced their export rates to attract additional traffic from their competitors. In contrast, rates on domestic coal increased substantially (App. 64a, *infra*). Moreover, in the 1975-1981 period, not a single complaint alleging that an export coal rate was unreasonable had been filed with the ICC (App. 64a, *infra*). Not until Section 229 of the Staggers Act compelled shippers to file complaints or have existing rates conclusively

deemed reasonable were complaints brought against virtually all existing export-coal rates. These complaints were among some 800 such challenges brought by various shippers and shipper groups under the "last chance" regime of Section 229.[6]

The Commission inferred from the historical record that market forces, and not ICC regulation, had restrained rail rates on export coal (App. 65a, *infra*). Those market forces appeared in various forms—the size and consequent concentration of bargaining power among export coal shippers, recent technological innovations that permit the long-term substantial product substitution between coal and other fuels, growing intermodal competition, and the railroads' self-interest in not pricing American coal out of the world market. The agency looked beyond the location of individual mine sites to overall control of coal traffic originating on a particular railroad. For example (App. 61a n.20, *infra*), from 54 to 68 percent of the respective export traffic of each major eastern carrier came from less than six companies, and several of those had substantial production on the lines of more than one carrier. The Commission concluded that in such cases coal producers have significant bargaining leverage (App. 61a, 64a, *infra*).

The Commission predicted that the forces which had in the past restrained rail rates would continue to do so and would result in reasonable rates in the future (App. 64a, 65a, 74a-75a, 127a-128a, 131a-132a, *infra*). Specifically, the agency predicted that

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[6] The Section 229 export coal rate complaints challenge the reasonableness of virtually all export coal rates to East Coast ports, to Los Angeles and Long Beach, and to certain Ohio River docks. ICC Docket No. 38301S. The complaints are presently pending before the Commission.

rates, absent regulation, would reflect the relatively equal bargaining power of shippers and railroads by falling within a zone bounded on the upper side by the shippers' cost of extraction and on the lower side by the railroads' costs (App. 64a-65a, 74a-75a, *infra*).

The Commission candidly acknowledged (App. 65a, *infra*) that "the past is not a perfect indication of future conduct," but observed that part of the statutory design was the available option of "revok[ing] our decision . . . and restor[ing] regulation" (App. 87a, *infra*), if abuses should materialize. The Commission later reaffirmed that "if our estimate should prove wrong, . . . this agency stands ready to limit or revoke the export-coal exemption if, contrary to our expectations, proven abuses do materialize" (App. 132a, *infra*).

3. The court of appeals reversed the Commission's decision because in its view the Commission applied an erroneous legal standard for exemption under Section 10505. The court noted at the outset of its analysis that exemption is clearly appropriate when railroads lack "market power" and when there is "effective competition" (App. 28a, *infra*). In this case, however, the court found that the legal issue could not be so easily resolved, because the Commission had not found "effective competition" (App. 28a-34a, *infra*). Nevertheless, the court acknowledged (App. 28 n.18, *infra*) that the Commission could grant an exemption in these circumstances if there was adequate assurance that reasonable rates would exist absent regulation (App. 35a-36a nn.21-22, *infra*). The court described the ICC's decision as assuring reasonable rates through a "model of price discrimination" under which the economic rents will be divided between shipper and carrier "at a point

between that at which the shipper only recovers its costs . . . and that at which . . . the carrier recovers only its costs" (App. 32a, 33a-34a, *infra*). Thus, the court found (App. 37a-38a, *infra*) the agency would regard rates as reasonable and nonabusive of market power if coal production were not reduced and the shippers were not wholly excluded from any economic rents above the shippers' cost recovery level.

The court admitted that the Commission has substantial discretion in carrying out its obligation to accommodate shipper and carrier interests and recognized that it must accord the exercise of that discretion "considerable weight" (App. 39a-40a, *infra*). The court also acknowledged that the Commission had exercised its discretion here by making factually based predictions that rates after exemption would continue to reflect the forces currently working to divide economic rents between shippers and railroads and would be reasonable (App. 38a, 46a, *infra*). The court found those predictions inadequate to support the exemption, however, because it viewed the principal issue as one of law, and not one of fact (App. 27a, *infra*). The court found the *legal* standard of reasonableness applied by the Commission "a wholly unreasonable construction of the Staggers Act's accommodation between shipper and carrier interests" (App. 39a, *infra*). Specifically, the court invalidated the exemption because under the Commission's standard of reasonableness and non-abuse of market power, the Commission would be "indifferent" to exactly how the economic rents would be divided (App. 44a, *infra*). This "indifference," the court held, is facially incompatible with the Staggers Act, because the statute gives shippers facing market-dominant carriers the right to complain that the profits garnered by the railroad are excessive, or that

a rate is unjustified because necessary carrier revenues could be more equitably generated elsewhere on the carrier's system (App. 42a-43a, *infra*). Put another way, assuring shippers that they would share in the economic rents was inadequate to assure reasonable rates would prevail after exemption (App. 45a, *infra*).

The court explicitly reached no conclusions on the agency's actual findings about the forces at work in the export coal industry or the history of export coal rates (App. 27a, 45a, *infra*). Instead, it dismissed those factual findings as irrelevant (App. 25a-27a, 45a-46a, *infra*). Moreover, even if relevant, such findings to be probative would have to determine "in nonconclusory terms" what division of rents would reflect reasonable rates (App. 46a, *infra*). The court also held that the Commission could not meaningfully consider provisions of the National Rail Transportation Policy, other than Section 10101a(6) regarding "reasonable rates," without considerably more detailed subsidiary findings (App. 44a, *infra*). For example, the court rejected the agency's reliance on Section 10101a(1), which mandates establishing reasonable rates by relying "to the maximum extent possible" on "competition and the demand for services" (*ibid.*). Although the court acknowledged that some competitive forces may exist and may constrain railroad power, if found that the Commission failed to explain why those forces are sufficient to protect shippers facing "monopolistic" railroads (*ibid.*).[7] Similarly, if the agency is to consider the policy of promoting railroad revenue adequacy (Section 10101a (3)), the court required the agency to specify "the

[7] The Commission had explained, *inter alia*, that those forces had in the past held rail rates below the levels the ICC had authorized (App. 64a, *infra*).

actual revenue needs of the carriers involved," determine how much revenue those carriers would gain from the exemption, and determine whether those revenue gains would be "disproportionately subsidized by one group" (App. 45a, *infra*).

REASONS FOR GRANTING THE PETITION

This case is of exceptional importance because the decision of the court of appeals, if permitted to stand, will effectively preclude the ICC from any significant use of the exemption power intended by Congress to be a cornerstone of federal rail transportation policy. By reversing a major exemption without ruling on the adequacy of a record overwhelmingly supporting the Commission's predictive judgment favoring exemption and by imposing statutorily gratuitous and virtually impossible burdens on the agency's use of the exemption process, the court below has eviscerated a statutory power intended to be an inherently experimental means of expanding reliance upon the marketplace beyond the statutory deregulation embodied in the Staggers Rail Act of 1980.

The court's action here completes the judicial restructuring of the exemption statute begun in *Brae*, *supra*, where the same court of appeals overstepped the bounds of appropriate judicial review and substituted its view of policy in reversing a decision to exempt the intermodally competitive boxcar traffic from ICC regulation. There the lower court gratuitously required a prior assurance of equitable divisions of "rents" among rail carriers (particularly where large and small carriers are participants in a joint rate). Finding inadequate the ICC's statement of the bases for its predictive judgment that regula-

tion was not required to assure the continuance of equitable distributions, the court reversed the exemption of boxcar traffic, even though there is no statutory mandate to preserve inter-carrier divisions.

In the present case, the court of appeals dealt with rail traffic subject to limited direct competition from other transportation modes, but on which non-transportation economic forces in the delivered-coal market effectively have restrained export-coal rail rates. But again as in *Brae*, the court of appeals ignored the statutory provision governing exemptions and used instead a statutorily gratuitous demand for "equitable" rent divisions (this time between shippers and carriers) to overturn the ICC's export coal exemption. Thus, viewed together with *Brae*, this case represents the virtual judicial repeal of Section 10505 as a means of carrying out the Congressional mandate to rely upon the marketplace whenever possible to regulate rail rates.

1. The fundamental purpose of the exemption provision is to identify areas of rail transportation, beyond those freed from regulation by the statute, which can be exempted without doing violence to the National Transportation Policy or making shipper abuse likely. Congress has directed the ICC to remove restrictions on changes in rail rates and services in "as many [instances] as possible." H.R. Conf. Rep. 96-1430, *supra*, at 105.

To make any of the judgments necessary to carry out its obligation, the ICC must of necessity make an educated *prediction* of future events, based on past experience and any other factual information before the agency. Because of the inevitably predictive nature of such judgments, there simply cannot be an *a priori* guarantee or warranty that future reali-

ties will conform to the agency's expectations. Congress plainly did not want the inherently uncertain nature of the process to stand as an obstacle to the granting of exemptions, because it explicitly expressed its intention that the agency "adopt a policy of reviewing carrier actions *after the fact* to correct abuses of market power." H.R. Conf. Rep. 96-1430, *supra*, at 105 (emphasis added). Indeed, when Congress first granted the Commission statutory authority to exempt rail transportation, it envisioned the exemption process as a means of evaluating "economic theory . . . concerning what may occur if regulatory requirements are eased" where "there is no empirical information available on what the results of such changes may be." H.R. Rep. 94-725, *supra*, at 243. Accordingly, Congress armed the ICC with a power of summary revocation—partial or complete. 49 U.S.C. (Supp. V) 10505(d). No proceeding is required for such revocation if the Commission so chooses. *Improvement of TOFC/COFC Regulation*, *supra*, 364 I.C.C. at 736-737; H.R. Conf. Rep. 96-1430, *supra*, at 104. Thus the Commission can respond promptly and flexibly to any post-exemption abuses or problems which render renewed regulation "necessary to carry out the [national] transportation policy." 49 U.S.C. (Supp. V) 10505(d). *American Trucking Ass'ns*, *supra*, 656 F.2d at 1123-1124.

Given the unavoidably predictive nature of any exemption decision, the rationality of the agency's predictions constitutes the heart of the case and simply cannot be ignored by a reviewing court. Yet that is precisely what occurred in this case. The court of appeals reversed the exemption, but disclaimed any "specific conclusions" on the adequacy of the evidentiary support for the Commission's decision (App.

45a, *infra*). The record supporting the export-coal exemption, dismissed by the court below, is one of the clearest and most compelling imaginable. It is difficult to envision a less hazardous experiment than exempting an area of rail transportation where (with the exception of the 1981 Section 229 complaints) not a single occasion for regulatory intervention by the ICC (*i.e.*, not even an allegation that the rates were unreasonable) occurred from 1975 to 1983 (App. 64a, *infra*) and where there is such an abundance of specifically identified market forces at work to restrain rail rates. During the same time period, shippers' real coal prices on the average had climbed far more rapidly than real rail rates (App. 65a, *infra*). In fact, the rail carriers did not even take all increases authorized on export-coal rates (App. 64a, *infra*).

The court of appeals avoided confronting the rationality of the Commission's predictions by casting the issue as one of law, and not of fact (App. 27a, *infra*). In the court's view, the issue was whether the Commission's standard for determining the reasonableness of rates after exemption was consistent with the Interstate Commerce Act. The court reversed the Commission's exemption because it found the legal standard for accommodating shipper and carrier interests, viewed in isolation from the factual context of this case, to be so thoroughly contrary to what Congress would have sanctioned that the exemption could not even be tried. The court's determination of the case as a matter of law, focusing upon only one of the fifteen elements of the National Transportation Policy (NTP), was fundamentally erroneous.

Section 10505 requires the Commission to analyze the fifteen often conflicting elements of Section

10101a, and to determine if there will be an abuse of market power. The Commission did both in the export coal decision, carefully analyzing every element of the NTP, and explaining at length why it believed market abuse unlikely.

In contrast, although Section 10505(a)(1) refers to the entire NTP, the court below concluded that only one of the fifteen NTP elements is of primary importance—the maintenance of "reasonable rates where there is an absence of effective competition and where rail rates provide [adequate] revenues." 49 U.S.C. (Supp. V) 10101a(6). Indeed, the court of appeals relied almost exclusively on the first portion of this element, even though all of the railroads involved in this case are revenue-*in*adequate. The court rejected the exemption because it found the Commission's legal standard of reasonableness for export coal rates represented an accommodation of interests so far outside the bounds of the agency's concededly broad discretion that it was unlawful *per se*.

The court recognized (App. 34a, *infra*) that the Commission had considered other elements of the NTP, and that those elements were relevant. Nevertheless, it found the agency's consideration entirely inadequate. For example, the court conceded (App. 44a, *infra*) both that Section 10101a(1) mandates reliance "to the maximum extent possible" on competition and demand to establish reasonable rates, and that competitive forces do exist and "constrain railroad power." The court required, however, that when there is no explicit agency finding of effective intermodal or intramodal competition, the Commission must explain why reliance on competitive forces is enough to protect shipper interests (*ibid.*). The Com-

mission's explanation—that railroad prices historically had been constrained and would continue to be constrained by non-regulatory market forces detailed by the Commission—was dismissed as "unreasonable." In the court's view, some unspecified greater showing is required.

The court of appeals plainly erred by elevating a portion of one of the fifteen NTP elements to paramount importance. This is especially true because the agency's action is a "reasonable accommodation of conflicting policies that were committed to the agency's care by statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778, 2783 (1984), quoting *United States* v. *Shimer*, 367 U.S. 374, 382 (1961). The many disparate elements of the NTP of Section 10101a are a virtual paradigm of the need for such an accommodation by an expert administrative agency. Here the court of appeals impermissibly intruded upon the agency's "rational weighing of competing policies," *FCC* v. *National Citizens Committee*, 436 U.S. 775, 803 (1978), and imposed its own view of the controlling policy elements, *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

2. Even if the court could properly decide the case solely on the basis of only a portion of one NTP element, the court could still not avoid confronting the rationality of the Commission's prediction that export coal rates will not rise to unreasonable levels if exempted. Given the inherently experimental nature of the exemption process, the court below could have invalidated this exemption as a matter of law only if it was certain that rates after the exemption would in fact be unreasonable (*i.e.*, an abuse of market power). There is clearly no point in experimenting if it is known in advance that the outcome of the

experiment will be unreasonable rates. If, however, the agency with the expertise and authority to determine reasonableness has predicted that post-exemption rates would be reasonable (and thus nonabusive), a reviewing court must defer to the agency's predictive judgments, if those judgments have a rational basis. See *FCC* v. *WNCN*, *supra*, 450 U.S. at 595-596; *FCC* v. *National Citizens Committee*, *supra*, 436 U.S. at 813-814. Here, without addressing the factual record, it was simply impossible for the court of appeals rationally to have held that rates following exemption would be so plainly unreasonable that the experiment had to be aborted.

Ultimately the court's only basis for holding the exemption unlawful *per se* is the fact that the Commission would be "indifferent" to the division of rents. This fact cannot justify the court's dismissal of the factual record. The ICC articulated the legal standard of "indifference" to particular rate levels in the context of an assumed level of future rates similar to those in the past, which the record shows had been restrained by forces other than the agency's intervention. Moreover, even if that were not the case, regulatory "indifference" to future economic rent divisions would only justify a *per se* invalidation of the exemption if that indifference also inevitably resulted in unreasonable rates. Such a conclusion cannot be drawn here.

It is fundamental that a court cannot find rates unreasonable when the ICC has not done so. *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131, 138-142 (1982); *Trans Alaska Pipeline Cases*, 436 U.S. 631, 638-639 n.17 (1978). No such finding has ever been made with regard to the historical rate levels, which the ICC saw as accurate precursors of post-exemption rates. Indeed, the question of the cur-

rent rates' reasonableness is currently before the Commission. As to any future rates, even under regulation those rates would be presumptively reasonable. The court of appeals thus could have no basis for its implicit assumption that post-exemption rates would be unreasonable absent an agency showing to the contrary.

3. The court of appeals not only improperly invalidated the particular exemption under review, but also imposed requirements so onerous as to effectively preclude future use of the exemption power. These requirements demand levels of certainty not only far beyond those required by statute, but beyond those that can be reasonably expected of the agency. Because the Commission cannot satisfy these gratuitous requirements, the court has effectively confined future exemptions to transportation for which there is a finding of "effective competition".[8] This is plainly erroneous, because as the court of appeals conceded (App. 28a n.18, *infra*), the exemption power is not confined to areas of "effective competition." Indeed, if it were, the Commission would be limited to exempting rail rates already beyond its jurisdiction.[9]

Under the court's theory, if the Commission wishes to consider the Staggers Act's revenue adequacy policy in deciding whether regulation is not necessary

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[8] The essence of this Court's decisions, as aptly summarized in *Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d 392, 406 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981), is that a demand for such certainty "would paralyze agencies merely because the future is not subject to proof."

[9] Rail traffic for which there is effective competition is already beyond the Commission's jurisdiction, because effective competition precludes a finding of the market dominance which is a prerequisite to ICC jurisdiction. 49 U.S.C. (Supp. V) 10709.

to advance the NTP, it will have to perform a highly detailed factual analysis. According to the court of appeals, the Staggers Act contains a "link between revenue needs and rate freedom," particularly embodied in the "Long-Cannon Amendment" to the Staggers Act, 49 U.S.C. (Supp. V) 10707a(e) (App. 42a-43a, *infra*). The essence of that provision is that "monopolistic discrimination should not be used to generate funds that could more efficiently and equitably be recovered elsewhere" (App. 43a, *infra*). Based upon the design of Section 10707a, the court of appeals found the agency "sought to maximize railroad revenue with no reference to the *actual revenue needs* of the carriers involved or the *size of the revenue gains* they would likely receive from the exemption, or the *degree* to which revenue gains would be disproportionately subsidized by one group" (App. 45a, *infra*) (emphasis added).

Plainly, the court below demanded as a prerequisite to exemption an analysis *in gross* of the Long-Cannon revenue contribution of all export-coal rates. This is a literally impossible task, the performance of which would contravene basic principles of rail rate regulation. Section 10707a(e)(2) requires the ICC to analyze the relative revenue-contribution "[i]n determining whether to investigate or not to investigate any proposed rate increase" [10] and "[i]n determining whether a rate is reasonable." [11] See *Arkansas Power & Light Co.* v. *ICC*, 725 F.2d 716 (D.C. Cir. 1984). That is, the Long-Cannon analysis is mandated even under regulation only where a particular rate is before the Commission for investigation [12] or on com-

[10] 49 U.S.C. (Supp. V) 10707a(e)(2)(B).

[11] 49 U.S.C. (Supp. V) 10707a(e)(2)(C).

[12] 49 U.S.C. (Supp. V) 10707.

plaint [13] and is thus being challenged as unreasonable. See, *e.g.*, *Potomac Electric Power Co.* v. *ICC*, 744 F.2d 185, 195-196 (D.C. Cir. 1984). The Long-Cannon analysis thus becomes part of the agency's adjudication of the reasonableness *vel non* of the particular rate before it. *Ibid.* The court of appeals, however, demands as a predicate for exemption that the Commission conduct a *plenary* Long-Cannon analysis of *all* potentially exemptable rates to assure that the carriers' revenues will not be enhanced with "funds that could more efficiently and equitably be recovered elsewhere" (App. 43a, *infra*).

The court's demand for a pre-exemption Long-Cannon analysis is, as a matter of statutory construction, gratuitous. Indeed, this is an instance where there is "nothing in the relevant statutes to justify what the court did here." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 557 (1978). The court of appeals' action "substitute[s] a judicial policy preference for the scheme adopted by Congress." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 303 (1981). Congress specified where a Long-Cannon analysis is required, and an exemption decision is not one of those occasions. But even if the Long-Cannon provisions were arguably germane to the exemption process, the kind of analysis hypothesized by the lower court is utterly infeasible. Absent a proceeding to determine the reasonableness of an identified rate, the ICC has no occasion (or practical means) to maintain cost and revenue data for *all* rates on a particular commodity, much less for *all* rates. Moreover, if the lower court's standard of "equitable" shipper-carrier rent divisions is to be the core of the required pre-

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[13] 49 U.S.C. (Supp. V) 11701.

exemption Long-Cannon analysis, any exemption decision would have to include not only rent-division data for the commodity to be exempted, but for the relevant carriers' entire systems as well. Otherwise, the "equitable" balance, according to the court below, might favor enhancing the carriers' revenue "elsewhere." Hence the "mix of traffic" [14] on the carriers' systems would have to be part of the pre-exemption record.

Performing a Long-Cannon analysis, even in a tightly focused individual rate proceeding, is a complex task, involving *inter alia* an evidentiary examination of a rail carrier's management practices. See *Potomac Electric Power, supra*, 744 F.2d at 195-196. To demand an exponentially more complex analysis for all export-coal rates (and a comparison of those rates' revenue contribution with the revenues from *all* other rates), as the lower court did here, is effectively to forbid the use of exemption on any traffic not perceived by the court as intermodally competitive or non-market dominant.

The court of appeals applied similarly gratuitous and onerous prerequisites to an agency finding that regulation is unnecessary to prevent market abuse. The court (App. 45a-47a, *infra*) would not accept a prediction that post-exemption rates would be reasonable because they would divide the economic rents roughly equally. Instead, the court insisted upon a precise determination of what particular division of rents would be reasonable. These kinds of advance reasonableness determinations are certainly not required by Section 10505, and go well beyond the agency's practice even under regulation where railroad rates are presumed reasonable until challenged

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[14] 49 U.S.C. (Supp. V) 10707a(e)(2)(C)(iii).

in particular instances. Here, the court of appeals plainly thinks the equivalent remedy in the exemption context—summary (and if, appropriate, selective) revocation—is entirely irrelevant, because its opinion never even mentions revocation. Thus, the Commission could not make an informed prediction about future reasonableness and rely on revocation to support that judgment; the agency would have to hypothesize the precise future distribution of rents, and then determine the reasonableness of those hypothetical rates. Given the complexity of such a determination when only one particular rate is at issue, see *Potomac Electric Power*, *supra*, having to make a multitude of such determinations based on hypothetical rates is practically impossible.

4. Essentially, by completely substituting its judgment for that of the agency under the guise of making a purely "legal" determination, the court of appeals has committed the same error addressed by this Court in *FCC* v. *WNCN Listeners Guild*, *supra*.

In *WNCN* the FCC had issued a policy statement concluding that the public interest would best be served by promoting diversity in entertainment formats through market forces, and not through FCC determinations (450 U.S. at 585). The FCC found that review of format changes was not required by the Communications Act, would not advance the welfare of the radio-listening public, would pose substantial administrative problems, and would deter innovative programming (*id.* at 588). The District of Columbia Circuit, which had previously developed criteria for determining when the FCC must review format changes, held the FCC's policy contrary to the Communications Act. Conceding that it possessed neither the expertise nor the authority to make policy

decisions, the court of appeals asserted that the format doctrine it required the FCC to follow was "law," not "policy" (*id.* at 592).

This Court reversed the decision of the court of appeals, holding that because the court's format doctrine was not compelled by the statute, the FCC's interpretation of the statute was not required to be set aside (450 U.S. at 593). The Court clearly articulated the standard of review, emphasizing that the statute did not define the public interest standard, and that the FCC accordingly had broad discretion in determining how best to achieve that goal (*ibid.*). The Court also emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference, noting that the diversity policy was not the only policy the Commission had to consider in fulfilling its responsibilities under its statute (*id.* at 596). In short (*ibid.*),

> The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for "the weighing of policies under the 'public-interest' standard is a task that Congress has delegated to the Commission in the first instance".

The Court held the FCC policy statement consistent with the Act because the FCC had provided a rational explanation for its conclusion that market forces would best provide diversity, and had assessed the benefits and harms likely to flow from FCC review of programming (450 U.S. at 595). The FCC's decision was in major part based on predictions about the probable conduct of licensees and the functioning of the relevant market, as well as on an assessment

of its capacity to make the determinations required by the court's format doctrine (*ibid.*). Those predictions, the Court held, were "within the institutional competence of the Commission (*id.* at 596). Moreover, the FCC's interpretation of the statute was consistent with the legislative history (*id.* at 597-98).

Here, as in *WNCN*, the statutory policy goal regarding maintenance of reasonable rates does not define the term or provide specific guidance on how the ICC should advance that policy. Thus, as the court of appeals conceded (App. 39a-40a, *infra*), the ICC has substantial discretion in carrying out the Congressional mandate, and its judgment on the appropriate balance is entitled to judicial deference. Here, as in *WNCN*, the court of appeals invalidated an agency's judgment for failing properly to advance one policy goal, when the agency was obligated to (and did) consider a whole range of competing policies. Here, as in *WNCN*, the ICC rationally explained its judgment, relying on the historical record and a host of other specifically identified market forces. The ICC's judgment, like the FCC's, was based in large measure on predictions about the future behavior of regulated entities and the export coal market that were within the agency's institutional competence. Finally, as in *WNCN*, the requirements imposed by the court on the exercise of agency discretion simply can not be borne without preventing the use of the statute as intended by Congress.

Under the guise of making a "legal" finding, the court of appeals has in fact substituted its own view of how best to accommodate the competing interests at issue here. Because *WNCN* made it clear that such policy judgments are to be respected if ra-

tionally based, and because the court of appeals did not find anything wrong with the predictive bases of the exemption decision, the court of appeals plainly erred in setting aside the ICC's decision.

CONCLUSION

The decision of the court below in this case, in combination with the decision we are seeking review of in No. 84-550, *Interstate Commerce Commission* v. *Brae Corp., et al.*, eviscerates the exemption process of 49 U.S.C. 10505.

The court of appeals has ignored a factually compelling record and invalidated a major exemption on "legal" grounds. In so doing, the court imposed a series of burdens not required by Section 10505, but which will effectively preclude the ICC from utilizing the exemption power, as intended by Congress, based on informed and expert predictions of future events.

The petition for writ of certiorari should be granted.

Respectfully submitted.

ROBERT S. BURK
Acting General Counsel

LAWRENCE H. RICHMOND
Deputy Associate General Counsel

H. GLENN SCAMMEL
Attorney
Interstate Commerce Commission

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